LEE TECK SENG

v.

LASMAN DAS SUNDRA SHAH

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL NO: 22-208-96]
1 JULY 1999

CONTRACT: *Misrepresentation - Fraudulent misrepresentation - Signing under the influence of liquor - Whether facts sufficient to justify such plea - Whether contract binding*

CONTRACT: *Non est factum - Fraud - When applicable - Whether facts sufficient to justify such plea - Whether contract binding*

The plaintiff's cause of action is based upon a deed of admission and acknowledgement, executed by the defendant on 24 April 1996. The essence of the deed of admission was that the defendant owed the plaintiff the sum of RM1,260,000.

The defendant's contention was that he was under the influence of liquor when he signed the document and that he did not realise what he was signing. He said that he was under the impression that he was signing a recommendation in respect of a purchase of a vehicle that the plaintiff had spoken to him about a week before the event.

The defendant counter-claimed for a sum of RM100,000 which he allegedly gave to the plaintiff due to the constant harassment by the plaintiff.

Held:

[1] When a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not. His signature is irrefutable evidence of his assent to the whole contract including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

[1a] In relation to the allegation of the defendant's state of intoxication, apart from the testimony of the defendant, none of the other plaintiff's witnesses were cross examined on this aspect. Bearing in mind that there are varying degrees of intoxication which relate to one's sense of comprehension of events, nothing was adduced by the defendant to establish this aspect.

[1b] Furthermore, the fact that the defendant took no action to report to the police the matter of threats or the fact that he was coerced into signing the document was inconsistent with his claim that he had been constantly harassed and that he feared for his life.

[1c] The defendant instead wrote to the Anti-Corruption Agency about some alleged illegal activities carried out by the plaintiff in respect of driving licences, which was totally unrelated to the alleged threats that the plaintiff was allegedly making against the defendant in respect of the deed of admission and acknowledgement.

[2] The defence of *non est factum* is raised by one who could not read whether through sheer blindness or actual illiteracy.

[2a] On the facts of the case, it was difficult to find that the defendant was intoxicated to the extent that he did not realise what he was signing on the day in question.

[2b] Moreover, on a careful scrutiny of the page, the defendant's signature was carefully placed on the designated spot, where signatures are normally placed with the defendant's identity card number placed below the signature in the same style of writing as his signature. This is inconsistent with the defendant's claim that he was intoxicated at the material time.

[2c] Furthermore in examination-in-chief, the defendant claimed that he had signed a blank document whereas in cross examination he said that he had signed the document without understanding its terms and contents. In the light of these inconsistencies, the plea of *non est factum* is not available.

[Plaintiff's claim allowed; defendant's counterclaim dismissed.]

Case(s) referred to:

Curtis v. Chemical Cleaning & Dyeing Co Ltd [1951] 1 All ER 631 ***(foll)***
East West UMI Insurance Bhd v. Low Boon Thong & Ors MMD (December issue, para 1566, Mallal's Monthly Digest 1992) ***(refd)***
Gutherie Waugh Bhd v. Malaiappan Muthucuman [1972] 2 MLJ 62 ***(refd)***
L'Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(foll)***
Lady Naas v. Westminster Bank Ltd [1940] AC 366 ***(refd)***
O'Connor Real Estate Ltd v. Flynn [1969] 3 DLR (3ed) 345 (NS) ***(refd)***
Saunders v. Anglia Building Society (Gallie v. Lee) [1971] AC 1004 ***(refd)***
Thoroughgood's case [1584] 2 Co Rep 92 ***(refd)***
UMW Industries (1985) v. Kamaruddin Abdullah [1989] 2 CLJ 1278 ***(refd)***
United Dominions Trust Ltd v. Western BS Romany [1976] 1 QB 513 ***(refd)***

For the plaintiff - Selvaratnam; M/s Selva & Assoc
For the defendant - Bachan Singh; M/s Bachan & Kartar

Reported by Mariette Peters-Goh

JUDGMENT

PS Gill J:

The plaintiff's cause of action is based upon a Deed of Admission, and Acknowledgment, executed by the defendant, on 24 April 1996. The Deed Of Admission and Acknowledgment was executed by the defendant on 26 April 1996, and produced and marked in court as P1.

For ease of reference P1 reads as follows:

> This Deed Of Admission and Acknowledgment is made the 26 day of April, 1996 between LASMAN DAS A/L SUNDRA SHAH (NRIC NO. 7641874) No. 43, Pesara Pasir Puteh, Taman Boon Bak, 16050 Ipoh, Perak (hereinafter called the First Party) of the one part And LEE TECK SENG (NRIC NO. 4063396) of No.5, Jalan Hussein, 30250 Ipoh (hereinafter called the Second Party) of the other part.
>
> Whereas the First Party hereby admits, acknowledges and confirms that since 1989 the second Party has paid to the First Party various sums of money totalling Ringgit One Million Two Hundred and Sixty Thousand (RM1,260,000.00) only for the purpose of investment in business ventures by the First Party on behalf of the Second Party.

Now this deed witnesseth as follows:

> 1. In consideration of the above premises the First Party hereby admits and acknowledges that the Second Party has since 1989 paid to the First Party various sums of money totalling Ringgit One Million Two Hundred And Sixty Thousand (RM1,260,000.00) only for the purpose of investment in business ventures (hereinafter referred to as the Investment Sum) and the First Party hereby also declares that he holds the Investment Sum and all dividends and profits derived therefrom On Trust for the Second Party.
>
> 2. Pending the repayment of the ...
>
> In witness whereof the parties hereto have hereunto set their hands the day and year first above written.
>
> SIGNED by the said LASMAN DAS A/L SUNDRA SHAH in the presence of:]]] sgd

a YAP KEW @ YAP SHOO FAH
I/C No.1408798

Signed by the said LEE TECK SENG]
in the presence of] sgd
]

b The plaintiff contended that the said document P1 was executed by the defendant, attested by 2 persons, namely PW1 and PW3, and was read, and understood by the defendant himself, who was an educated person. The deed was executed primarily for monies lent to the defendant, by the c plaintiff, for the purpose of investment, over a period of time. A brief history was given by plaintiff as to how the said relationship between plaintiff and defendant emerged, and how the monies came to be lent to the defendant. The total sum evidenced in P1 was the principal sum invested, together with the unpaid dividends that the plaintiff was promised by the defendant.

d The defendant's defence in the main, was that he was under the influence of liquor at the material time when he signed the said document, and he did not realise what he was signing. He was under the misimpression at the material time, that what he was signing was a recommendation in respect of a purchase of a vehicle that the plaintiff had spoken to him e about a week before the event. He categorically denied that the contents of the documents were explained by him to two of the attesting witnesses, and further contended that there was a variation in his signature on the document and his normal signature, because of the inebriated state he was in. He equally denied owing any sums of monies to the plaintiff, though f he admitted having borrowed money from plaintiff in the past of which, everything has since been paid.

The defendant had counter-claimed for a sum of RM100,000 which he allegedly gave to the plaintiff, due to the constant harassment of the plaintiff as a result of his signing the said Deed of Admission of Debt.

g Certain salient issues surfaces from these brief recital of facts, which I propose to examine.

Non Est Factum And Other Related Issues

h It is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, like the present case, then, to use the words of Denning J (as he then was) in *Curtis v. Chemical Cleaning & Dyung Co. Ltd.* [1951] 1 All ER 631, "His signature is irrefutable evidence of his assent to the whole contract,

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including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation. Scrutton CJ in *L Estrange v. F. Grancob Ltd* [1934] 2 KB 394 had this to say:

> When a document containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing is bound, and it is wholly immaterial whether he has read the document or not.

It must be stressed in the present instance that the defendant has alleged both fraud and the fact that the document P1 – Deed of Admission and Acknowledgment was not explained to him, and he merely signed a blank page which he thought was merely a guarantee document.

On the evidence adduced in this context, the defendant had this to say:

> I was not aware that there was a page number on the document handed to me. I signed a blank page. I have never signed a blank document. I did so because I was close to plaintiff. I was assured I was signing a guarantor document.

On the issue of his state of mind when he signed the document – P1, this is what the defendant said.

> Plaintiff used to frequent my house at night, plaintiff has asked me to give recommendation letters for his friends. Plaintiff used to do business in connection with tractors and vehicles. He told me he was raising money from bank to buy tractors. After that he came to my house at night to sign some documents. After that I was having some drinks – liquor. I was a bit sober. He came about 11 pm, with 2 friends. Prior to his coming, he spoke to me about purchase of vehicle a week earlier. When he (plaintiff) came that night I had some drink as I was excited to see them ... .
>
> He asked me to sign a paper. He told me it was about tractors. I did not bother to read the documents. I trusted plaintiff. It was a one page document. Plaintiff told me he would attach other documents later. I signed the document – P1. ... I was only shown page 2 of the document. Page 1 was not shown to me. I was a bit high. I deny that I read the document P1 or even explained it to PW2 & PW3 who were present.

In respect of the state of intoxication of the defendant, apart from the testimony of the defendant on this aspect, and the uncertainty of the plaintiff, that the defendant was under the influence of alcohol, none of the other plaintiff's witnesses were cross examined on this material aspect. Something so vital as this should have been cross examined upon by defence counsel. In vain it was not done.

It is of interest to note that upon signing the document P1 and being confronted with it, a couple of days later, the defendant had issued two cheques dated 29 May 1996 and 30 May 1996 – for the sums of RM30,000 and RM50,000 respectively. Both the cheques were tendered as evidence in court. The cheques were apparently dishonoured on presentation to the bank by the plaintiff. The defendant stated that the cheques were given, as he feared something untoward would happen to him, due to the threats of the plaintiff and his friend Yap Kew alias Yap Shoo Far, PW2.

He (defendant) had euphemistically said he was 'high', on the day in question when P1 was signed to which I ask myself, what he meant by 'high'. Was he completely inebriated that he had absolutely no clue as to what was happening or was he merely tipsy? There are to my mind varying degrees of intoxication which relates to one's sense of comprehension of events. Nothing was adduced to establish this aspect by the defendant which I felt was vital to his case.

Having said this, and presumably in fear of his life the defendant took no action to report this matter of the threats, or the fact that he was coerced into signing the document P1 to the police. Surely a man of education like the plaintiff should have done so. I dare say, it would have been the first thing that any educated man would have done. However the defendant instead wrote to the Anti Corruption Agency about some alleged illegal activities carried out by plaintiff in respect of Driving Licences on 13 January 1998, which to my mind is totally unrelated to the alleged threats that plaintiff was making against the defendant, in respect of the Deed of Admission and Acknowledgment.

This brings me to the defence of *non est factum*, which I believe is the main plank of argument of the defendant. This defence would normally be raised by one who could not read, whether through sheer blindness, or actual illiteracy, in regard to claim, based on a promise made under seal (*Thoroughgood's case* [1584] 2 Co. Rep. 92; and *Lady Naas v. Westminster Bank Ltd* [1940] AC 366 at 374, 375; [1940] All ER 485 at 488, 489, HL). It is the basis of the defence that the signatory is mistaken as to the nature of the transaction. But the law has developed rapidly and the implications are wide and far reaching. As the law developed in tandem with the global modernisation, the defence of this nature was further weakened. Thus, a man is now estopped by his signature from denying from being bound by his consent to the provisions contained in a deed (*Lady Naas v. Westminster Bank Ltd (supra)* or in an agreement as reflected in *O'Connor Real Estate Ltd v. Flynn 3 DLR* (3edn) 345 (NS).

In the present case before me, the defendant has raised the issues of fraud, mistake and *non est factum*. Judging from the evidence tendered, I find it hard to accept that the defendant was intoxicated to the extent that he did not realise what he was signing on the day in question. If one is to believe that he (defendant) had signed P1 under the influence of alcohol, and he genuinely felt to quote him that it was done "out of stupidity", then surely he should not have tendered two cheques, namely D5(A) and D5(B) when he was approached by the plaintiff, and his friend. As mentioned, on realising his mistake if there was any such mistake or fraud in signing P1, the defendant should have lodged a police report. This was not done, thus throwing doubt on the version of the defendant as regards to these lines of defence.

It would appear that where it is not possible to rely on misrepresentation, or fraud, the plea of *non est factum* would be resorted to, as the last resort. According to the defendant, he had been under the influence of alcohol when he signed a blank page, which presumably is p. 2 of the said document P1. Having said this, on a careful scrutiny of p. 2 which is a fully printed page, the defendant's signature is carefully placed in the designated spot, where signatures are normally placed, with the defendant's identity card number, placed below the signature, in the same style of writing as the signature. This does not sit well with the evidence of the defendant that he was 'high' at the material time.

There was also the evidence of the defendant in court that he had signed a blank document which he vehemently maintained in his examination-in-chief. However, in cross examination and on a perusal of the defence pleadings, he (defendant) stated that he had signed the document, P1, without understanding the terms and contents. There is a great difference to my mind to say that one signed a blank document and then in the next breath to say that it was a written document, but that he chose not to read it. The court is left at the end of the day not knowing whether the defendant had signed a blank document P1 or whether it was a printed document, which he had chosen not to read at the material time. This variation in evidence does to my mind affect the credibility of the defendant.

I would at this stage rely on the case of *Saunders v. Anglia Building Society* [1971] AC 1004, or as it is better known, as *Gallie v. Lee*, a House of Lords decision which held:

> A person who signs a document and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs, which, if neglected, prevents him from denying his liability under the document according to its tenor.

Lord Wilberforce in his judgment on the aforesaid cases went further to say as follows:

> I would add that the onus of proof in this matter rests upon him (that is) to prove that he acted carefully, and not upon the 3rd party to prove the contrary.

In *Gallie v. Lee,* the plaintiff alleged that she executed a Deed of Assignment of her house instead of some other form of arrangements. When the Deed of Assigment was presented to her for execution, the contents therein were completed but she did not read the said document due to the fact she broke her glasses. After careful consideration on the application of the principle of *non est factum*, the House of Lords held that such plea is not available in the circumstances of this case.

A case more similar to the facts of our case is *United Dominions Trust Ltd. v. Western B.S. Romany* [1976] QB 513. In this case, a purchaser bought a car from a dealer. The purchaser needed hire-purchase finance which was arranged by the dealer. The purchaser executed a standard kind of document with the relevant particulars left blank. The dealer subsequently inserted an amount higher than was required by the purchaser and, the document was not that of a hire-purchase transaction but instead, it was for a loan. The purchaser, when he obtained a copy of the loan document realised the incorrectness, but did nothing about it. When the finance company brought an action against the purchaser for default of installment payments, the purchaser argued that there was no *consensus ad idem* in the purported contract between the parties; that the defendant had not intended this document to be filled up in the way in which it was filled up and therefore, the document did not represent his true intention thus, there was no contract in law and, the finance company has no right to recover, by virtue of such a non-existent contract.

The Court of Appeal rejected the aforesaid argument and adopted the principle as laid down in *Gallie v. Lee.* Lord Scarman in his judgment had this to say:

> I cannot accept Mr. Eady's submission that there is great difference between signing blind a completed document the contents of which one has not read and signing a printed document, as here, with the blanks for the particular transaction not filled in but agreeing to or authorising, another to fill in those blanks and the figures later. It seems to me such a man does make the document that he is signing his document; he takes responsibility for it; and he takes the chance of fraudulent filling in of the blanks. True, it is technically a different situation from the signing of a completed document; but I think it to be a distinction without a substantial difference. It appears to me that the plea of *non est factum* is just not available to such a man; he cannot be heard to say in those circumstances that there no *consensus ad idem*.

The aforesaid principles of law seem to have been followed in our High Court by the decisions of Justice Dato' Siti Norma in *East West UMI Insurance Bhd. v. Low Boon Thong & Ors.* (para. 1566 December issue, *Mallal's Monthly Digest* 1992) and *UMW Industries (1985) v. Kamaruddin bin Abdullah & Anor* [1989] 2 CLJ 1278.

In *UMW Industries (1985),* Justice Dato' Siti Norma had this to say:

> As for the 2nd defendant's intention that he only signed blank guarantee forms, he has only himself to blame as the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent.

I find the aforesaid authorities laid down sound principles of law on persons executing blank documents. A person who chooses to be careless, or not bothered to find out the contents therein, or relied completely upon others to complete the same, is responsible for his own actions and he is prevented from denying that the contents therein do not bind him.

To recapitulate the facts in this case, the defendant did not deny that he had signed P1, what he denies is that he was not aware of the terms of the said Deed of Admission. He of course says in evidence, that he was given in to believe it was a deed of guarantee for a vehicle transaction. At the risk of repetition one is not quite sure whether he had signed a blank document, or a printed document at the material time. It seems to me such a man does make the document that he is signing his document, he takes responsibility for it, and he takes the chance of a fraudulent filling of the blanks. True it is techically a different situation fiom the signing of a completed document, but I think it is a distinction without a substantial difference. It appears to me that the plea of *non est factum*, is just not available to such a man.

To sum up on this point, it is good to repeat Lord Pearson's judgment in *Gallie v. Lee* of an example of a busy managing director who has a pile of documents to be signed in a few minutes before the next meeting and, his secretary arranges them for maximum speed with only the spaces for signature exposed, and the managing director signs them "blind". To this Lord Pearson comments that he may be exercising a wise economy of time and energy:

> ... but the person who signs the documents in this way ought to be held bound by them, and ought not be entitled to avoid liability so as to shift the burden of loss on an innocent third party. The whole object of having documents signed by him is that he makes them his documents and takes responsibility for them.

On examining the plea of *non est factum* and the pleadings of fraud raised by the defence, I find that both the defences are closely alligned. Having come to the conclusion that the plea of *non est factum* has failed and examining the evidence in regard to the defence of fraud and mistake carefully, I hold that these defences are equally without merits. Based on the aforesaid, I find on a balance that the plaintiff's claim on P1 for the sum of RM1,260,000 is established and allowed the claim with costs.

In respect of the counterclaim of the defendant, wherein he claims the sum of RM100,000 which he allegedly paid the plaintiff *vide* cheques of 30 May 1996 and 29 May 1996 D5 A & B I find no cogent evidence that this money was paid under coercion or that it was money that the defendant claims he had allegedly lent to the plaintiff. His evidence in this aspect is worth reproducing – p. 25 notes of evidence.

> 1 cannot remember how much money plaintiff borrowed from me. But I was happy to claim RM100,000.00. This sum he may have borrowed from me. I cannot remember how I gave him the money whether by cash or cheque.

For these reasons I dismissed the counterclaim with costs.

On the issue of consideration for the Deed of Admission and Acknowledgment, all I can say is that any deed or agreement executed, or made in the ordinary course of business must be presumed to be legally binding. The first question one has to ask oneself, is why the defendant, a person of more than average business acumen, and intelligence, should gratuitously sign a document admitting to an amount, if he did not accept liability therefore. He had recourse to legal advice. The tendering of the two cheques by the defendant demolishes whatever defence that the defendant put up, that he did not know what he was signing.

Once evidence is established, that there was a business relationship between the plaintiff and defendant, what need was there to explore the law of consideration? *Gutherie Waugh Bhd v. Malaiappan Muthucuman* [1972] 2 MLJ p. 62.